

DECISION MEMORANDUM (FOR PUBLIC COMMENT)

SUBJECT: Public Interest: *De Minimis* General Applicability Waiver of Section 70914(a) of P.L. 117-58, Build America, Buy America Act, 2021 for EPA Financial Assistance Awards and Procurements

FROM: Environmental Protection Agency

TO:

The Environmental Protection Agency (EPA) is seeking a comment on a proposed Public Interest: *De Minimis* Waiver from the Build America, Buy America (BABA) Act requirements in section 70914 of the Infrastructure Investment and Jobs Act (IIJA) Public Law 117-58. This is critical to ensure that agency infrastructure projects conducted by state, tribal, local, and financial assistance recipients sustain progress in communities across the country.

Introduction

In November 2021, Congress passed, and the President signed, the IIJA which included BABA. This is a transformational opportunity to build a resilient supply chain and manufacturing base for critical products here in the United States and will catalyze new and long-term investment in good-paying American manufacturing jobs and businesses. Consistent with the policy direction of Executive Order 14005: Ensuring the Future is Made in All of America by All of America's Workers, section 70914 of IIJA establishes government-wide Buy America conditions on all federal financial assistance programs and the projects funded through federal financial assistance funded after May 14, 2022.

As required by section 70913 of the IIJA, EPA determined that BABA applies to 63 agency programs¹. EPA remains committed to implementing BABA to cultivate the domestic manufacturing base for a range of products. Products that qualify for a *de minimis* waiver cumulatively may comprise no more than a total of 5 percent of the total cost of the materials used in and incorporated into a project. EPA's infrastructure programs vary widely from small community projects costing thousands of dollars up to large billion-dollar regional infrastructure projects. Based on an assessment of agency infrastructure projects, some larger projects have such significant material costs that a dollar cap would negate the intent of the *de minimis* waiver. As such, EPA is not including a dollar cap for its waiver. However, EPA added language requesting public comment on a possible cap.

BABA De Minimis Waiver

The Office of Management and Budget's April 18, 2022, memorandum, "Initial Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure" (M-22-11) encourages agencies to consider whether a general applicability public interest waiver should apply to infrastructure project purchases below a *de minimis* threshold to reduce the administrative burden for recipients and agencies. OMB directs agencies to ensure that recipients and Federal agencies make efficient use of limited resources, especially if

¹ See <https://www.epa.gov/system/files/documents/2022-01/report-epa-identification-of-federal-financial-assistance-infrastructure-programs.pdf>

the cost of processing the individualized waiver(s) would risk exceeding the value of the items waived.

This waiver advances BABA by reducing the administrative burden to potential assistance recipients where the costs of compliance with BABA could distract from the focus on higher value BABA compliant items. Failure to provide recipients such flexibilities could delay the award for infrastructure projects as assistance recipients must exert considerable effort accounting for the sourcing for miscellaneous, low-cost items.

Anticipated Program Impacts Absent a Waiver

BABA currently impacts more than 60 EPA programs². The Agency is committed to robust implementation of the Act's Buy America Preference in an efficient and effective manner. This waiver seeks to significantly reduce the administrative burden on recipients while exempting a small share (5% or less) of the total cost of materials from the Buy America Preference.

Infrastructure projects often contain a relatively small number of high-cost products incorporated into the project. In solicitations for a project, these high-cost products are generally described in detail via project specific technical specifications. For these major products, recipients are generally familiar with the conditions of availability, the potential alternatives for each detailed specification, the approximate cost, and the country of manufacture of the available components.

Infrastructure projects also involve the use of potentially thousands of miscellaneous, generally low-cost products that are essential for construction and are incorporated into the physical structure of the project. For many of these miscellaneous products, the country of manufacture and the availability of alternatives is not always readily or reasonably identifiable prior to procurement in the normal course of business; for other miscellaneous products, the country of manufacture may be known but the miscellaneous character in conjunction with the low cost, individually or procured in bulk, mark them as potentially *de minimis* items. Examples of potential *de minimis* items could include washers, screws, off-the-shelf fasteners (e.g., nuts and bolts), UV bulbs, door hardware, electrical outlets, outlet covers, drywall tape, panel boxes, insulation, etc. Examples of items that may not be appropriate to be classified as *de minimis* for many projects (dependent on the conditions and purpose of the project) could include significant process fittings (e.g., tees, elbows, flanges, and brackets), primary distribution system fittings and significant valves, force main valves, main-line pipes for sewer collection and/or water distribution, essential treatment and storage tanks, critical structural support structures, etc).

Failure to grant such a waiver creates significant administrative burden for EPA and recipients as both sides must negotiate such products on a project-by-project basis, which will increase the cost to the taxpayer, delay the award of assistance agreements and procurement, and has negligible relevance to the intent of BABA. With application of this waiver, federally funded infrastructure projects would be aided in meeting the critical public health protection and environmental project purposes, on time and on budget. By focusing the programs' attention on high-value domestic products (representing most of the federal infrastructure investment), EPA will be well positioned to catalyze resilient domestic supply chains and invest in good-paying American manufacturing jobs and businesses. Absent the waiver, critical public health protection and environmental infrastructure projects could expend resources

² See <https://www.epa.gov/system/files/documents/2022-01/report-epa-identification-of-federal-financial-assistance-infrastructure-programs.pdf>

inefficiently, potentially failing to deliver on the critical goals of projects and the domestic preference requirements.

Assessment of Cost Advantage of a Foreign-Sourced Product

Under OMB Memorandum M-22-11, agencies are expected to assess “whether a significant portion of any cost advantage of a foreign-sourced product is the result of the use of dumped steel, iron, or manufactured products or the use of injuriously subsidized steel, iron, or manufactured products” as appropriate before granting a public interest waiver. EPA’s analysis has concluded that this assessment is not applicable to this waiver, as this waiver allows only a small, *de minimis* value of products to be waived relative to the total cost of a project. EPA will perform additional market research as it implements the BABA requirements to better understand the market and to limit the use of waivers caused by dumping of foreign-sourced products.

Public Comment

The Agency is particularly interested in public comments on whether 5% is the appropriate threshold for a *de minimis* waiver or whether a different threshold would be more appropriate. The Agency is also interested in public comments on whether the agency should add a dollar cap in addition to the percentage threshold to the waiver.

Waiver Decision

Section 70914(b)(1) of the IIA authorizes the Administrator to waive the requirements of BABA if implementation would be inconsistent with the public interest. Due to the critical need to reduce the administrative burden for recipients and agencies and to ensure recipients can effectively carry out the EPA funded activity in a timely manner, it is in the public interest to waive BABA requirements for *de minimis* materials used in and incorporated into a project. EPA will review this waiver every 5 years after the date on which the waiver is issued.

If you have any questions concerning the contents of this memorandum or wish to submit a comment, please contact Dan Coogan at EPA_BABA_Waiver@epa.gov.